

IN THE
Supreme Court of the United States
OCTOBER TERM—1944

No.....

EDNA BENTON WAKE WYMAN and EDWARD B. BARTLETT,
as Executors under the Last Will and Testament of
Edward E. Wyman, deceased,

Petitioners,
against

PAN AMERICAN AIRWAYS, INC.,

Respondent.

BRIEF IN SUPPORT OF THE MOTION

Opinions of the Courts Below

The opinions of the Courts below are found in the petition, and for the sake for brevity, are not repeated here.

Jurisdiction and Statement of the Case

The jurisdictional basis for the petition and statement of the case is found in the petition, and for the sake of brevity, are not repeated here.

Specification of Errors

1. The Supreme Court of the State of New York, as well as the Court of Appeals of the State of New York, erred in holding that the common law of New York that before a contract of transportation by a common carrier calling for limited liability, can be binding, a choice of a contract with full liability must be given to the passenger, was abrogated by Article 22 of the Warsaw Convention; and that the common law of New York holding that notice must be given to the passenger that he is traveling under a limited liability contract before such limited liability can be availed of, must be clearly given to the passenger.
2. The Supreme Court of the State of New York and the Court of Appeals of the State of New York erred in interpreting Article 25 of the Warsaw Convention.
3. The Supreme Court of the State of New York and the Court of Appeals of the State of New York erred in limiting the respondent's liability.

ARGUMENT**POINT I**

The limitation of liability provided for by the Warsaw Convention was not binding in the case at bar because a choice of contracts was not offered to deceased whereby he could obtain passage without limited liability.

The law of New York is that before a contract of limited liability in the transportation of passengers of a common carrier can be valid and binding on the passenger, there must be offered to him a choice of contracts whereby he can obtain passage with full liability (*Conklin v. Canadian Colonial Airways*, 266 N. Y. 244, 247, 248; *Straus & Co. v. Canadian Pacific R. Co.*, 254 N. Y. 407, 414; *Kil-*

thau v. International Mercantile Marine Co., 245 N. Y. 361; *Burke v. Union Pacific R. Co.*, 226 N. Y. 534).

It is also the law of the State of New York that the limited liability provisions of a transportation contract can become binding on the passenger only in the event of his knowing its provisions (*Aplington v. Pullman Co.*, 110 App. Div. 250).

It was conceded in the case at bar that there was no choice of contracts available to prospective passengers whereby one could obtain passage with full liability as well as limited liability.

The Supreme Court of the State of New York, as well as the Court of Appeals, held that Article 22 inhibited the application of the New York rule with respect to choice of contracts. Apart from any other considerations, the Warsaw Convention itself specifically permits the application of the New York rule. Article 22, subdivision 1, provides in part:

“ * * * Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.”

It is obvious from the foregoing sentence, that the framers of the Warsaw Convention, themselves, recognized that an outright and inflexible limitation of liability would be inconsistent with well-established rules of law concerning the propriety of such a limitation.

Why else should the Warsaw Convention provide for the contingency of contracts of carriage in which liability could be provided for in any amount higher than \$8,300.00?

That being so, the rule that treaties should be so construed, if possible, so as not to impair rights, operates to avoid the limitation when, as in this case, it is conceded that no choice of contracts was offered to the passenger whereby he could obtain passage without limited liability.

Moreover, nothing on the ticket purchased by the deceased would indicate to him that there was a possible choice of contracts which would entitle him to carriage with full liability. The ticket merely says that the transportation is governed by the rules of liability promulgated by the Warsaw Convention. Nothing is said in the ticket what the terms of the Warsaw Convention are. Nothing is said in the ticket where copies of the Warsaw Convention may be obtained for perusal. Nothing is said in the ticket, directly, that there is a choice open to the passenger of different contract. In fact, the language of the ticket does not even say that there is a limitation of liability. All it says is that the transportation is subject to the rules of liability as promulgated by the Warsaw Convention. Rules of liability may mean the Statute of Limitations, may mean procedural steps to be followed, may mean requirements for notice. By no interpretation of language can it be said that the passenger is clearly and unequivocally informed that he is being transported pursuant to a contract of limited liability. This complete absence of notice to the passenger that he is travelling under a limited liability contract, vitiates, it is submitted, the effectiveness of the limitation, even though created by a treaty.

In that connection, the Court's attention is respectfully called to the following. The ticket provides (Petitioners' Ex. 26): That the transportation is subject to the rules relating to liability established by the convention of Warsaw of October 12, 1929 if such convention, by its terms, is applicable thereto.

How is a passenger to know whether the Convention, by its terms, is applicable to the transportation in question?

Article 1, Subd. 2, of the Convention, defines international carriage as one where the place of departure and the place of destination are situated either within the territories of two high contracting parties, or within the terri-

tory of a single high contracting party, if there is an agreed stopping place within a territory subject to the sovereignty of another power, even though that power is not a party to the Convention. Thus, for a person to know whether the transportation in question is subject to the rules of the Warsaw Convention, he must know whether the point of departure and the point of destination are within territories of high contracting parties. The ticket yields no such information. And, if the passenger should turn to the original Warsaw Convention, he will discover that neither Hongkong, a British Crown Colony, nor the United States were high contracting powers. Therefore, neither the ticket nor the original Convention, itself, would enable the passenger to know that his transportation was an international one subject to the rules of liability of the Warsaw Convention.

Article 38 of the Convention provides that after it has come into force, it remain open for accession by any state, and that accession shall be effected by a notification addressed to the Government of Poland, which in turn will inform the government of each of the high contracting parties, and that the accession takes effect as from the 90th day after such notification.

Assuming even that a passenger presumably knows that at some time after the adoption of the Warsaw Convention, the United States acceded to the Convention, is he also presumed to know that some time after the adoption of the Warsaw Convention, Great Britain in behalf of Hongkong acceded to the Convention; that Great Britain in behalf of Hongkong notified the Polish Government of its accession; that the Polish Government had notified the other high contracting parties of Hongkong's accession, and that ninety days had elapsed from the date of such notification?

All of the foregoing are essential facts that have to exist before the rules of the Warsaw Convention can apply to the transportation in question. For a passenger to know

them and be bound by them would pre-suppose a knowledge on his part not only of the treaties of the United States, but also of executive acts by the Government of Poland, and of treaties entered into by Great Britain in behalf of Hong-kong. Such supposed knowledge exceeds anything that can be reasonably expected of a prospective passenger of an airplane, and in the absence of such knowledge, any limitations depending on it, cannot, it is submitted, be availed of.

POINT II

The willful misconduct set forth in Article 25 of the Warsaw Convention means gross negligence and not intended injury.

Petitioners *prima facie* established such willful misconduct on the part of the respondent. In the courts below, respondent urged that to establish willful misconduct within the purview of Article 25 of the Warsaw Convention, it was incumbent upon the petitioners to show that the death of their testator was caused by wrongful acts of the respondent, committed out of mere wantonness or lawlessness or with a willful purpose or deliberate design to inflict injury. That that was the interpretation given to willful misconduct by the Court is evident from its citation of authority (Court's opinion at fols. 366 and 367 of the Record). The authorities cited by the Court treat of situations involving Penal Statutes where intent to do a wrong or harm is a prime factor.

This contention stemmed from respondent's interpretation of the language of the original treaty which is in French, wherein the words translated by our State Department as "willful misconduct" was the French noun "dol" and which, apparently, has no precise equivalent in the English language. It was argued that "dol" possessed

a connotation of deception, of fraud, of intended harm, and it was consequently urged that in the absence of proof of such deception or fraud or intended harm, there was a failure of proof on petitioners' part on the issue of wilful misconduct. It is submitted that the interpretation contended for is unjustified and erroneous.

Were the construction contended for by the respondent and applied by the Court, *i. e.*, designed harmful act, intended by the framers of the Warsaw Convention, they certainly could easily have expressed that concept in so many plain and unequivocal words. The failure to use words to express precisely the idea of designed harm be-speaks an intention to promulgate a rule not so narrow and restrictive, and this position is supported by the very proceedings at the Convention.

Sir Alfred Dennis, the English delegate at the Convention, said (Record of Proceedings, bottom of p. 40):

"We have in my Country the expression, 'wilful misconduct', I think that it covers all you want to say; it covers not only acts done with deliberate purpose, but also acts of thoughtlessness without regard for the consequences."

And Dr. Goedhuis, in his authoritative work entitled "National Air Legislations and the Warsaw Convention," writes on page 275:

"M. Walterbeek, President of the Legal Section of the Fifth International Congress of Air Navigation and one of the authors of the Warsaw Convention, declared that in the event of *faute grave* (grave or serious fault) of the carrier or one of his agents, the carrier would not be able to avail himself of the limitation of liability established in the Warsaw Convention." (Cf. Minutes of the Fifth International Congress of Air Navigation, page 1173.)

In an exhaustive article entitled "The Air Carrier's Liability to Passengers in International Law" (1936 Air

Law Review, p. 25), the author, Mr. Lincoln H. Cha, points out (p. 57) that the framers of the Convention, instead of using the words "acte illicit intentionell" (intentional illegal act), used the word "dol." He states, citing French authorities on the point, that "The term 'dol' in French includes gross fault (*la faute lorde* in French or *culpa lata*, in Latin)."

Mr. Cha also states (1936 Air Law Review, 25, 58) that a proposal that the unavailability of limited liability be restricted to acts deliberately designed to injure, was rejected by the framers of the Convention.

And surely, were "dol" to have the meaning now urged, "intended harmful act," our State Department and the British Parliament (the English equivalent statute, British Carriage By Air Act, 22 and 23, Geo. V. c. 36 (1932) likewise uses the words "willful misconduct") could have made that narrow special meaning unmistakably clear.

The foregoing certainly negatives the contention argued for by the respondent.

The Warsaw Convention is not a penal statute. It is a treaty defining contractual rights, contractual obligations and contractual duties. In such circumstances, to inject into the case a criminal concept of intentional harm is to do the grossest kind of violence to the subject matter of the compact.

A further indication of the fact that no criminal concept was intended by the framers of the Convention is the provision in Article 25 thereof that a carrier cannot avail itself of limited liability where the damage is caused by wilful misconduct "or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." The use of the word "default" certainly belies any inference that what was contemplated by the statute as a

basis for avoiding limited liability was only such conduct as would constitute deliberate and intentional wrong almost tantamount to a crime. The word "default" is defined in Webster's dictionary as "failure to do what is required by duty or law, neglect." It will be hardly argued that encompassed in this definition is any concept of designed or intended injury. To expand the plain meaning of the word "default" so as to include the idea of designed or intended injury, is to go far beyond all permissible limits of statutory construction.

The term "willful misconduct," when applied to civil actions, has been judicially defined by many courts. These definitions disclose that the word "willful," when used in a civil case, does not connote any intention to injure or any malice or anything criminal but signifies merely that the actor knows or should know that his conduct or failure to act, if persisted in, is likely to cause harm to another.

Sorrel v. White, 153 Atl. 359 (Vermont), at p. 362;
Jones v. Hathaway, 70 Pac. 2nd 681 (California),

p. 683;

Allison Coal and Transfer Co. v. Davis, 221 Ala.

334, at p. 336;

Davis v. M'Cree, 299 Fed. 142, 145;

Sabel v. Chicago & N. W. R. R. Co., 255 Mich. 548,

553.

In view of the duty of a common carrier of passengers by air to exercise the highest vigilance and care with respect to the maintenance and equipment used in the transportation of its passengers (Fixel, *The Law of Aviation*, Chapter 7, Section 6; *Boulineaux v. City of Knoxville*, 99 Southwestern, Section 557; *Nysted v. Wings, Ltd.*, 1942 United States Aviation Reports 120, 126; Section 01.720 of the Civil Air Regulations of the Department of Commerce of the United States), the conduct of the respondent in dispatching an airplane onto a long journey in a condition

where it continuously leaked gasoline, *prima facie* establishes willful misconduct within the purview of Article 25 of the Warsaw Convention. It is misconduct to send out an unairworthy plane, which a plane uninterruptedly leaking highly flammable gasoline undoubtedly is, on a long journey and it is willful misconduct to do so knowingly. Particularly is this true when one of the minimal requirements of airworthiness, as promulgated by statute, is that gasoline tanks shall be so designed and their rivets and welds so located as to resist vibration failures or leakage (Sections 04.00 and 04.623 of the Civil Air Regulations of the United States Department of Commerce).

That the gasoline which leaked came from the tanks, can hardly be denied. Given an airplane with a fuel tank containing gasoline and given a gasoline leak into other parts of the airplane, the only inference possible is that the gasoline leaked from the fuel tank, particularly in view of the recurring nature of the incident.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its appellate jurisdiction; and that to such an end, a writ of certiorari should issue to the Supreme Court of the State of New York.

Dated, March 16, 1945.

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